Shyer v Shyer
2020 NY Slip Op 30252(U)
January 28, 2020
Supreme Court, New York County
Docket Number: 651109/2018
Judge: Joel M. Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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CATHERINE SHYER, as preliminary executrix of the Estate of Robert Shyer,

Plaintiff and Counterclaim Defendant,

- v -

CHRISTOPHER SHYER, JAMES SHYER, ZYLOWARE CORPORATION,

Defendants and Counterclaim Plaintiffs.

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INDEX NO. 651109/2018

MOTION DATE N/A

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

ZYLOWARE CORPORATION

Third Party Plaintiff,

-against-

CATHERINE SHYER, individually

Third Party Defendant.

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Third-Party
Index No. 595921/2018

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 222, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 269, 270, 271, 272, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 352, 370, 371, 372, 373, 374

were read on this motion for PARTIAL SUMMARY JUDGMENT.

For several years, Defendant Zyloware Corporation ("Zyloware") purported to exercise options to buy back shares from one of its shareholders, the late Robert Shyer, at a price and in a manner prescribed by certain agreements. In this case, Robert's estate is challenging the propriety of Zyloware's exercise of those options, arguing that the price and the manner of Zyloware's share repurchases defied the terms of the agreements. There are a total of 56.15 shares at issue in this case, but the motions now before the Court concern mainly the purchase of

21 of those shares during the years 2014-2016. Zyloware seeks partial summary judgment dismissing the Estate's claims as to those 21 shares, on the ground of tax estoppel (*i.e.*, the claims are precluded by representations made in Robert's contemporaneous tax returns). The Estate, in a cross-motion, seeks partial summary judgment declaring that Zyloware's practice of withholding Robert's entire annual salary to pay for the company's exercise of its options violated the parties' agreements. Zyloware defends its method of exercising the options and argues, in the alternative, that Robert waived any objection to that method.

For the reasons set forth below, both Zyloware's motion and the Estate's cross-motion are denied.

FACTUAL BACKGROUND

Zyloware is a family-run New York corporation engaged in the business of selling eyewear. The company was founded, and has subsequently been led, by members of the Shyer family. Amended Complaint ("Am. Compl.") ¶¶7-9, 11-28 (NYSCEF Doc. No. 29); Zyloware Rule 19-a Statement of Undisputed Facts ("Zyloware SUF"), ¶1 (NYSCEF Doc. No. 218).[1] For many years, Robert Shyer was the CEO and Chairman of Zyloware, and at all relevant times he was one of Zyloware's four shareholders. Am. Compl., ¶5. Robert died in 2017, and Catherine Shyer, Robert's widow, was appointed the executrix of Robert's Estate the following year. Zyloware SUF, ¶¶2-3.

A. Zyloware's Acquisition of Robert's Option Shares from 2014-2016

In 2013, Robert and his three fellow Zyloware shareholders – Henry Shyer (his brother), Christopher Shyer (his son), and James Shyer (his nephew) – executed a Shareholders Agreement for Zyloware Corporation (the "Shareholders Agreement") and a Master

[1] Unless otherwise stated, the facts presented here are undisputed.

Employment Agreement (the "Employment Agreement") (collectively, the "Succession Agreements"). *Id.*, ¶5. Under the Shareholders Agreement, Robert, Henry, Christopher, and James each owned 25% of Zyloware's then-outstanding shares – 56.15 shares apiece. *Id.*, ¶6.

Through Section 10 of the Shareholders Agreement, Robert and Henry each granted Zyloware an option to acquire from them up to 7 shares of Zyloware company stock, annually, from 2014 through 2018 ("Option Shares"), at a price calculated by Zyloware's accountant pursuant to a contractual formula. *Id.*, ¶7. Specifically, the Shareholders Agreement required Zyloware to calculate an Option Price based on the company's "Corporate Enterprise Fair Market Value," which in turn was derived from a multiple of a three-year weighted average of Zyloware's pre-tax earnings. Shareholders Agreement, §§10.4, 1.1. (NYSCEF Doc. No. 198).

In 2014, 2015, and 2016, Zyloware issued annual exercise notices (in June of each year) to purchase all 7 of that year's available Option Shares. The exercise notices identified the Option Price calculated by Zyloware's accountant, along with an attachment summarizing the accountant's calculations. *Id.*, ¶9.

These transactions were documented on Robert and Catherine's federal income tax returns for the years 2014 through 2016 (the "Tax Returns"), which reported that Zyloware paid for 7 Option Shares in each of those years. *Id.*, ¶¶10-11. The Tax Returns themselves were prepared by Stephen Wagner, Zyloware's outside accountant, relying at least in part on information supplied by Zyloware. *See* Nov. 13, 3019 Stephen Wagner Dep. Tr. (NYSCEF Doc. No. 373). One of the tax forms asked for a "Selling price" and "Contract price" in connection with the sale of the Option Shares. Robert and Catherine – through Wagner, the accountant – filled in the "Selling price" and "Contract price" to correspond with the Option Price calculated by Zyloware in the Option Notices. Zyloware SUF, ¶11. The resulting "Installment sale

income" was taxed at the rate applicable to capital gains, rather than to ordinary income. *Id.*, ¶14.

In deposition testimony in this case, Catherine acknowledged that at the time the Tax Returns were filed, she was aware of at least some of the objections to Zyloware's purchases of the Option Shares that would come to animate this action. *Id.*, ¶15. By 2014, Catherine held Power of Attorney to act as Robert's attorney-in-fact as to all his affairs. *Id.*, ¶4. Beginning in 2015, Catherine came to suspect that Zyloware was miscalculating the Option Price, and improperly diverting Robert's salary in purchasing the Option Shares. These suspicions were shared with Ronald Weiner, an independent accountant. After Weiner reviewed a copy of Zyloware's 2014 Option Notice, he informed Catherine that Robert was "getting screwed," because Zyloware was using a 35% discount in calculating the Option Price that Weiner saw as inconsistent with the Shareholders Agreement. *Id.*, ¶22. By May 2015, Weiner recommended to Catherine that she consult an attorney about the potential improprieties. Weiner also advised Catherine that "tax returns could be restated, if needed," *see id.*, ¶¶16, 26, though the Tax Returns have not in fact been amended since.

B. Zyloware's Use of Robert's Salary to Pay for the Option Shares

1. The Salary Credit

The other dispute before the Court, previewed above, concerns the way in which Zyloware paid for the Option Shares. This dispute also springs from the Succession Agreements. In the years that Zyloware bought Robert's Option Shares, Zyloware was entitled to withhold portions of Robert's salary, as a credit towards its payment for the shares. In the Shareholders Agreement, Section 10 required Zyloware to pay the purchase price of the Option Shares "in equal weekly or biweekly installments, as the case may be, that correspond to *the salary payment*

dates occurring during the calendar quarter following the date of that exercise of the option." Shareholders Agreement, §10.3 (emphasis added); *see* Counterstatement of Undisputed Facts ("CSUF"), ¶3 (NYSCEF Doc. No. 265). In turn, the Employment Agreement provided that Robert's base salary:

> shall be reduced (but not below zero) by the amount, if any, actually paid to [Robert] pursuant to Section 10 of the Shareholders Agreement during such *weekly or biweekly (as the case may be) pay period corresponding to such salary payment[.]*

Employment Agreement, §5(a)(Y) (emphasis added) (NYSCEF Doc. No. 199). Robert's base salary under the Employment Agreement was $350,000, plus additional compensation in the form of bonuses and reimbursements. CSUF, ¶1.

As noted above, from 2014-2016, Zyloware purported to purchase 7 Option Shares per year from Robert. It did so by issuing a single notice, in June of each year, for the purchase of all 7 of that year's Option Shares. In the Estate's view, this meant that Zyloware was then limited to withholding Robert's salary in only the calendar quarter following such notice. Since Robert earned $87,500 per calendar quarter (his base salary divided by four), Zyloware therefore could not, according to the Estate, deduct more than $87,500 from Robert's salary each year.

Zyloware decries this interpretation as unfairly elevating form over substance. The company observes that the Succession Agreements nowhere expressly cap the deduction at $87,500 (or any other number), and in fact permit Zyloware to pay for the Option Shares across all four quarters of the year – which is what Zyloware claims that it did. Zyloware says it could have purchased the 7 Option Shares by issuing four quarterly notices for the purchase of 1.75 shares per quarter, and then withheld Robert's salary in the quarter following each notice. That way, Zyloware would have deducted the full value of the Option Shares over the year. In Zyloware's view, the fact that the company chose to exercise the option for all 7 shares in one

notice in each year, rather than splitting it into 4 quarterly notices, should not change the total amount Zyloware can credit from Robert's salary for its purchases.

2. Robert's Silence About the Salary Credit

The two sides offer differing views on what, if anything, Robert knew or should have known about Zyloware's salary withholdings as they were happening. Zyloware emphasizes that, during the period when Zyloware was purchasing Option Shares from Robert, Robert never voiced any objection to how Zyloware was applying the salary credits. Throughout that time, Robert had access to the Succession Agreements – indeed, he was involved in negotiating them. And Robert signed the annual (rather than quarterly) 2014 Option Notice, in his capacities as Zyloware's chairman and as a shareholder. *See* NYSCEF Doc. No. 205 ("This shall serve as notice that the Company wishes to exercise the Option to Purchase 7 Share each of [Robert] as noted in Paragraph 10 of the Shareholders Agreement."). Catherine, meanwhile, testified that by February 2015, she knew Zyloware had purported to exercise the Option Shares from Robert, and asked Zyloware why it had been depositing two income checks weekly into Robert's checking account, rather than one. Zyloware SUF, ¶17.

The Estate's account of this time period tells a different story. The Estate insists that Robert – through his representatives – repeatedly pressed Zyloware for more information concerning the salary credits, but to no avail. In 2016, Catherine wrote to Zyloware asking about the company's payments and offsets in connection with the Option Shares, *see* Affirmation of Peter A. Mahler ("Mahler Aff."), Ex. 1 (questioning if it was "correct to offset Robert Shyer's salary by offsetting purchase price") (NYSCEF Doc. No. 303), and again in 2017 requested a written explanation of Zyloware's payments, *see id.*, Ex. 2 ("With respect to the [Employment Agreement], we do not understand how the amount being paid to Robert Shyer comports with

the terms of that Agreement") (NYSCEF Doc. No. 304). Zyloware's responses to these and other inquiries fit a frustrating pattern, the Estate says, providing only general assurances that Zyloware was "living and working by the terms of the agreement to the letter." *Id.*, Ex. 3 (NYSCEF Doc. No. 305).

C. The Instant Action

These disputes form a piece of the larger fight between Zyloware and the Estate. Catherine, in her capacity as the Estate's preliminary executrix, sued Zyloware along with Christopher, James, and Henry Shyer in March 2018, alleging that Defendants failed "to honor the plain terms of the Company's Shareholders Agreement governing the repurchase of shares from [Robert]," and engaged in a scheme "to enrich themselves through self-dealing and diversion of corporation assets." Am. Compl., ¶1.

The Estate alleged four causes of action: (1) declaratory judgment, (2) breach of contract, (3) breach of fiduciary duty, and (4) injunctive relief. This Court (Bransten, J.) dismissed the breach of contract claim against the individual defendants, and dismissed the injunctive relief claim against all defendants. *See* NYSCEF Doc. No. 64.

The declaratory judgment claim, which is at the heart of the instant motions, seeks a ruling that:

> (a) . . . none of the Zyloware [sic] four successive annual options to repurchase 7 Zyloware shares from Robert Shyer were effectively exercised so that the Estate presently owns 56.15 such shares;
>
> (b) . . . any calculation of the Enterprise Fair Market Value of any Zyloware shares either once owned or now owned by Mr. Shyer or his Estate cannot lawfully include any marketability discount and must include all items required to be added back to consolidated earnings under the Shareholders Agreement, including all extraordinary and non-recurring expenses and those constituting the waste of corporate assets; and

> (c) . . . any calculation of the Enterprise Fair Market Value of any Zyloware shares once owned or now owned by Mr. Shyer or his Estate must be based only on that number of Zyloware shares actually outstanding at the time of repurchase.

Id., ¶30. The Estate acknowledges that "Zyloware contends that it exercised the options," but argues that "none of its attempts to do so were legally effective because none of these attempts complied with the requirements of the Shareholders Agreement." *Id.*, ¶20. "[M]ost importantly," Zyloware "materially fail[ed] to value the shares pursuant to the terms of the Shareholders Agreement." *Id.* Because "the price offered by Zyloware to the Estate for the Estate's shares was radically too low," the company "repudiated, and lost, any rights it might otherwise have had to exercise the options." *Id.*, ¶¶21, 28.

Conversely, Zyloware seeks in its Second Counterclaim a declaratory judgment that "Zyloware purchased 28 Option Shares during the period 2014-17, paid for those Shares at the Option Price calculated by Wagner, and properly availed itself of the [salary credit] in paying for the Option Shares." *See* NYSCEF Doc. No. 407.

Now, both sides are moving for partial summary judgment to adjudicate discrete swaths of the dispute as a matter of law. Zyloware moves for partial summary judgment as to the Estate's declaratory judgment claim and its own reciprocal declaratory judgment counterclaim, on the basis of tax estoppel. Zyloware asks the Court to declare, among other things, that "[t]he Estate cannot contest (1) [Zyloware's] calculation of the Option Price of the 21 Option Shares and (2) the manner in which Zyloware credited Bob's salary (including his so-called insurance bonus) in purchasing said shares." Zyloware Mot. for Partial S.J., at 2 (NYSCEF Doc. No. 219). At the same time, the Estate cross-moves for partial summary judgment declaring that Zyloware's withholding of Robert's entire annual compensation to fund its repurchases of the

Option Shares violated the terms of the Shareholders Agreement. Pl.'s Opp. to Partial S.J. and Cross-Mot. for Partial S.J., at 12 (NYSCEF Doc. No. 264).

LEGAL ANALYSIS

Summary judgment is appropriate when the movant has made "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d 40, 49 (2015). If such a showing has been made, the burden shifts to the opposing party to "produce evidentiary proof in admissible form" sufficient to establish the existence of material issues of fact which require a trial in the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). "[O]nly the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment." *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

I. Zyloware's Motion for Partial Summary Judgment

Under the doctrine of tax estoppel, "[a] party to litigation may not take a position contrary to a position taken in an income tax return." *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415, 422 (2009). The doctrine grew out of the principle of judicial estoppel, which "prevents a party from asserting a factual position in a legal proceeding that is contrary to a position previously taken by the same party in a prior legal proceeding," to avoid "the successive assertion of factually contradictory statements as the truth." *Zemel v. Horowitz*, 11 Misc. 3d 1058(A), at *4 (Sup. Ct. N.Y. Cty. 2006) (cited by *Mahoney-Buntzman*, 12 N.Y.3d at 422). As with legal proceedings, tax returns serve as sworn attestations about certain facts – such as how much income was earned, and what sort of income it was – "made under the penalty of perjury." 12 N.Y.3d at 422.

In effect, tax estoppel prevents a party to litigation from making factual assertions that flatly contradict the facts asserted in prior tax returns. For example, the income reported on one's income tax forms is considered the final word as to the amount of income received that year: a litigant cannot later argue that he or she actually received more, *see Naghavi v. N.Y. Life Ins. Co.*, 260 A.D.2d 252 (1st Dep't 1999) (holding that the plaintiff was precluded from asserting that his income was more than that which he had declared on his tax returns), or less, *see Pon v. GDA Realty Corp.*, No. 654298/2015, 2019 WL 1765888, at *4 (Sup. Ct. N.Y. Cty. April 5, 2019) ("Since plaintiff previously represented under the penalty of perjury on income tax returns that his annual income from [the defendant corporation] was $15,600, he may not subsequently adopt a contrary position and claim that [the defendant] failed to pay him wages.").

This logic also extends to the treatment of taxable events. Once a taxpayer expressly characterizes a transaction one way on tax returns, the taxpayer is held to that designation in litigation. In *Mahoney-Buntzman*, a divorce case, the husband had claimed $1.8 million as "business income" on his federal income tax returns, then claimed during the divorce that those same proceeds should be characterized as from the sale of stock he owned in a prior marriage, in order to shield that money from distribution in the divorce. 12 N.Y.3d at 420. The Court of Appeals held that the husband was estopped from making that argument because the Court "cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns." *Id.* at 422. Similarly, a transaction reported as a sale cannot be recast as a loan, *see Zemel*, 11 Misc. 3d 1058(A), at *6 (estopping the plaintiff from characterizing transaction as a loan when it was described as a short sale on tax returns), just as a loan cannot be transfigured into an investment, *see Walsh v. Blaggards III Restaurant Corp.*, 131 A.D.3d 854 (1st Dep't 2015) ("Defendant

stated in its tax returns that the $50,000 paid by plaintiff was a loan and that the outstanding balance was $44,500; those statements are binding on defendant. . . . [and] contrary to defendant's argument otherwise, that amount is a loan, not an investment[.]"). In all these cases, tax estoppel serves a potent, simplifying purpose, insisting on a single version of the facts. *See In re Tran*, No. 2012-1785/A, 2014 WL 2216162, at *2 (Sur. Ct. N.Y. Cty. May 22, 2014) ("[A]lmost all of the estoppel cases have involved inconsistencies as to fact, rather than . . . mixed questions of fact and law.") (declining to apply doctrine where question "involve[d] a complex mix of fact and law").

Even so, the doctrine has limits. Tax estoppel applies to *factual* inconsistencies, not the legal meaning of certain facts. As with judicial estoppel, "[t]he submission of a legal argument is of a different character than an inconsistent framing of one's factual pleadings, and therefore not a basis for [the doctrine]." *Matter of Excelsior 57th Corp. (Kern)*, 218 A.D.2d 528, 529–30 (1st Dep't 1995). Reporting one's income accurately to the government cannot fairly be construed as a release of one's legal rights. As the court noted in *Corrente v. Pollack*, No. 653833/12, 2013 WL 230377, at *4 (Sup. Ct. N.Y. Cty. Jan. 18, 2013), "attest[ing] to the amounts declared in [a party's] corporate tax returns does not amount to a concession that said amounts were justified." Rather, "the tax returns simply represent the amounts that were in fact received . . . for the subject year." *Id.* In *Corrente*, the plaintiffs' tax returns did not estop them from arguing "that the amount [they] received from [the] defendants was less than what was due, as a result of [the] defendants' alleged tortious acts and breach of fiduciary duties." *Id.* This is a fundamentally different point from the one advanced in *Naghavi* and *Pon*, *supra*, which held that a taxpayer cannot restate the amount of income documented on tax returns. Tax estoppel prevents someone (like the plaintiff in *Pon*) from reporting income on tax returns and then

arguing in court that he or she received none; it does not prevent someone, however, from arguing that he or she should have received more, but for some illegal act.

The doctrine is circumscribed in other ways too. "The First Department and other courts . . . have made clear that the characterization of ownership of a company on tax returns is not necessarily dispositive on the question of ownership in other contexts." *PH-105 Realty Corp v Elayaan*, No. 656160/2016, 2019 WL 1750858, at *2–3 (Sup. Ct. N.Y. Cty. Apr. 19, 2019) (collecting cases); *Bhanji v. Baluch*, 99 A.D.3d 587, 587–88 (1st Dep't 2012) (holding that ownership interest listed on tax returns "was insufficient, without more, to satisfy petitioner's burden, since corporate and personal tax returns, even when filed with government agencies, are not in and of [themselves] determinative") (internal quotation marks omitted). Courts have also recognized that certain designations on tax returns give way, in litigation, to controlling statutory definitions, *Wood v. Artifact Properties, LLC*, 169 A.D.3d 1503, 1505 (4th Dep't 2019) (ruling that defendant's classification of certain property as "commercial" in tax filings "d[id] not estop it from relying upon the [one- or two-family home] exemption in this action" under Labor Law §240(1)), and that "the failure to pay taxes does not require a holding of estoppel," *Angiolillo v. Christie's, Inc.*, 64 Misc. 3d 500, 517 (Sup. Ct. N.Y. Cty. Apr. 26, 2019).

In view of the purposes and limits of tax estoppel, the Court finds that the doctrine does not warrant partial summary judgment in Zyloware's favor. At bottom, the Estate is disputing the legality of Zyloware's exercise of the options, based on provisions in the Succession Agreements. The Estate's argument is that "none of the options allocated to Zyloware to purchase [Robert's] shares were ever *properly and lawfully* exercised," Am. Compl., ¶23 (emphasis added), because (among other things) the prices calculated by Zyloware allegedly violated the Shareholders Agreement. In other words, "none of [Zyloware's] attempts to

[exercise the options] were legally effective because none of these attempts complied with the requirements of the Shareholders Agreement." *Id.*, ¶20. If the Estate were contesting, instead, how much money Robert *received* from Zyloware for his Option Shares or how those proceeds should be reported to the IRS, the Tax Returns could provide conclusive documentary evidence of those facts. *See* Zyloware SUF, ¶¶11-13. But the Estate is not disputing what is on the Tax Returns. Instead, the Estate's arguments raise questions of law, not just of fact, resolution of which will require a legal determination about the terms of the Succession Agreements and the propriety of Zyloware's actions. The amounts listed on the Tax Returns, and the rates at which those amounts are taxed, do not answer the dispositive questions in this case. Therefore, Zyloware's tax estoppel theory is inapplicable here.

The precedent on which Zyloware relies stakes the same analytical ground covered above – that tax estoppel, as a conceptual matter, precludes only restatements of past facts. *See Livathinos v. Vaughan*, 121 A.D.3d 485, 486 (1st Dep't 2014) (holding that litigant, having declared on income tax returns that she owned 100% of a company's stock, could not assert in litigation that someone else owned 50%); *In re Cassini*, No. 343100/G, 2016 WL 6311379, at *6 (Sur. Ct. N.Y. Cty. July 14, 2016) (invoking tax estoppel where litigant declared on income tax returns that certain property belonged to decedent and then asserted in litigation that property in fact belonged to her). Missing from these cases is support for Zyloware's extension of the doctrine into a waiver of legal rights. To reiterate, the Estate is not seeking to restate the facts reflected on the Tax Returns as to the amount received from Zyloware. The case turns, instead, on whether the amounts reported on the Tax Returns violated the Succession Agreements.

Zyloware's argument also poses some vexing practical problems. It is unclear what, in Zyloware's view, Robert and Catherine could have done to preserve their legal arguments with

respect to the Option Shares without violating federal law. "One of the basic aspects of the federal income tax is that there be an annual accounting of income," such that "[e]ach item of income must be reported in the year in which it is properly reportable and in no other." *Healy v. Comm'r*, 345 U.S. 278, 281 (1953). The Shyers, like everyone else, must pay taxes on the income they receive in the year they actually receive it, regardless of additional sums they hope to one day win. *See generally Hightower v. Comm'r*, 90 T.C.M. (CCH) 530 (T.C. 2005), *aff'd*, 266 F. App'x 646 (9th Cir. 2008) ("Petitioner argues that the funds were not income until the litigation was final and that the sale was incomplete because he tendered his shares without endorsing the certificates. We disagree.").[2] While Zyloware suggests that Robert and Catherine could have filed "a Certificate of Inconsistent Treatment," as authorized under Subsection 6037(c)(2)(A) of the tax code, *see* NYSCEF Doc. No. 272, at 7-8, citing *Rubin v. United States*, 904 F.3d 1081 (9th Cir. 2018), the company cites to no cases that hinge the applicability of tax estoppel on the filing of such a document.

Therefore, Zyloware's motion for partial summary judgment is denied.

II. The Estate's Cross-Motion for Partial Summary Judgment

The Succession Agreements are not ambiguous about how the salary credit is supposed to work. *First*, under the Shareholders Agreement, Zyloware "may exercise the Option in whole or in part on any or all of the dates that are within the seven days before the first day of each calendar quarter of each year." *Id.* Given those choices, Zyloware decided to issue a single notice, in June of each year, for the purchase "in whole" of all 7 of that year's Option Shares.

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[2] Indeed, Zyloware's own outside accountant, Stephen Wagner, acknowledged at his deposition that taxpayers must declare proceeds in the year of "constructive receipt," whether or not they agree with the amount: "Unfortunately . . . the IR[S] requires you to file a tax return, but it doesn't allow you to delay it until the lawyers are done fighting." Nov. 13, 2019 Stephen Wagner Dep. Tr. at 300-301.

Second, Zyloware "shall pay" the Option Price for those Option Shares "in equal weekly or biweekly installments, as the case may be, that correspond to the salary payment dates *occurring during the calendar quarter following the date of that exercise of the option*." *Id.* (emphasis added). Again, Zyloware fully exercised the option in June of each year, so payment is due during "the calendar quarter following" that month. Simple enough so far. *Third*, the Employment Agreement allows Zyloware to withhold from Robert's salary "the amount, if any, actually paid to [Robert] pursuant to Section 10 of the Shareholders Agreement during such weekly or biweekly (as the case may be) pay period corresponding to such salary payment." Since payment must come in the June calendar quarter, and only in that quarter, it follows that Zyloware can only withhold Robert's salary earned during that quarter.

Zyloware fails to muster any textual support for its position that, although the company issued a single Option Notice in one quarter of each year, it could still avail itself of four quarters of salary credit. The company points to language in the Succession Agreements authorizing option purchases prior to "each calendar quarter of each year" – language which, Zyloware urges, "proves the parties' mutual intention to allow Zyloware to pay for the Option Shares across all four quarters of the year." NYSCEF Doc. No. 272, at 13. That may be so, but the Succession Agreements explicitly condition the timing of the salary credit on the timing of the option purchase. Thus, even assuming there was an intent to "allow Zyloware to pay for the Option Shares across all four quarters of the year," such an intent does not override the express language of the agreement which ties the salary credit to the *quarter* in which the relevant option notice is issued. This also explains why the Succession Agreements do not expressly limit the salary credit to $87,500 – because, arguably, Zyloware could have used a larger credit if it issued the option notices in a different manner. But that is not what Zyloware actually did. The

unambiguous text of the Succession Agreements plainly prohibits Zyloware from drawing a salary credit for quarters during which the company did not exercise an option.

Nevertheless, the Estate is not entitled to partial summary judgment on this issue because Zyloware's defense of waiver raises material questions of fact as to whether Robert relinquished his right to have his salary withheld in only "the calendar quarter following the date of th[e] exercise of the option." As the Court of Appeals has explained:

> Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. Such abandonment "may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage." However, waiver "should not be lightly presumed" and must be based on "a clear manifestation of intent" to relinquish a contractual protection. Generally, the existence of an intent to forgo such a right is a question of fact.

Fundamental Portfolio Advisors, Inc. v. Tocqusville Asset Mgt., L.P., 7 N.Y.3d 96, 104 (2006) (internal quotation marks and citations omitted). "[M]ere silence or oversight does not constitute clear manifestation of an intent to relinquish a known right," and neither does "mistake, negligence, or thoughtlessness." *Matthew Adam Properties, Inc. v. The United House of Prayer*, 126 A.D.3d 599, 601 (1st Dep't 2015) (denying summary judgment and finding "[a]t the very least, under the circumstances of this case, the issue of whether plaintiff intended to forgo its right to payment . . . is a question of fact"). On the other hand, a party's prolonged "failure to assert [a] right" can, in certain circumstances, "evince[ ] a knowing intent not to claim such right." *Jumax Assoc. v. 350 Cabrini Owners Corp.*, 46 A.D.3d 407, 408 (1st Dep't 2007) (granting summary judgment to the defendant on its affirmative defenses of waiver and estoppel).

On the record here, there are fact questions about whether Robert's conduct during the relevant time period "evince[d] an intent not to claim a purported advantage." *Fundamental*, 7 N.Y.3d at 104. As Zyloware argues, Robert signed the 2014 Option Notice in his capacities as

Zyloware's chairman and as a shareholder, had access to and was involved in the negotiation of the Succession Agreements, yet apparently never asserted the position that Zyloware could deduct only $87,500 from his salary despite only issuing one exercise notice per year. *See* NYSCEF Doc. No. 205; Zyloware SUF, ¶17.

The parties also appear to dispute when, if ever, Robert fully understood Zyloware's salary credits: Zyloware contends that Catherine knew "as early as February 2015," while the Estate maintains that it remained in the dark about the propriety of Zyloware's payments until at least 2017. *See* Mahler Aff., Exs. 1-3; *compare* NYSCEF Doc. No. 272, *with* NYSCEF Doc. No. 306. "It is not the court's function on a motion for summary judgment to assess credibility." *Ferrante v. Am. Lung Ass'n*, 90 N.Y.2d 623, 631 (1997). In addition, since both sides point to *Catherine's* actions as evidence for and against Robert's waiver, that may raise further fact disputes about the extent to which her knowledge of Zyloware's share-buyback process can be imputed to Robert. *Compare* Zyloware SUF, ¶15 ("[Robert] and Catherine filed the Tax Returns with knowledge of one or more of the alleged grounds" underlying this action), *with* Resp. to Zyloware SUF, ¶15 (stating that "the Estate has no personal knowledge of whether [Robert] had knowledge of one or more of the grounds underlying this action"). Based on these facts, and drawing all reasonable inferences in the light most favorable to Zyloware, as the Court must do on the Estate's cross-motion, the Court finds that issues of waiver preclude summary judgment in the Estate's favor.[3]

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[3] Zyloware's separate defense of equitable estoppel, relegated to a footnote in its brief, fails as a matter of law. "An estoppel rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury. It is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought." *Nassau Tr. Co. v. Montrose Concrete Prod. Corp.*, 56

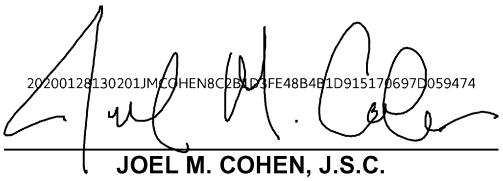
* * * *

Accordingly, it is

ORDERED that Zyloware's motion for partial summary judgment is **Denied**; and it is further

ORDERED that the Estate's cross-motion for partial summary judgment is **Denied**.

This constitutes the Decision and Order of the Court.



1/28/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE

N.Y.2d 175, 184 (1982) (internal citations omitted). "The party asserting estoppel must show (1) lack of knowledge of the true facts, (2) reliance on the conduct of the party estopped, and (3) a prejudicial change in its position." *Broadworth Realty Assocs. v. Chock 336 B'way Operating, Inc.*, 168 A.D.2d 299, 301 (1990). Zyloware points to no evidence suggesting that it "ha[d] been misled" by Robert, or that Robert concealed information regarding the buyback program from Zyloware. *See Fisher Bros. Sales v. United Trading Co. Desarrollo y Comercio, S.A.*, 191 A.D.2d 310, 311-12 (1st Dep't 1993) ("[I]t is only where a party has a duty to speak and fails to do so in order to deceive, that silence may give rise to an estoppel."). Therefore, it does not have a viable estoppel defense.